

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

AGGREGATE INDUSTRIES –
NORTHEAST REGION, INC.

Employer¹

and

INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL UNION
NO. 4, AFL-CIO

Petitioner²

Case 1-RC-22200

DECISION AND DIRECTION OF ELECTION³

The Employer is engaged in the production and sale of asphalt at a series of plants. The Union seeks to represent a bargaining unit consisting of plant operators, loader operators, laborers, and a foreman employed at the Employer's Chelmsford, Massachusetts plant. The Employer asserts that foreman Daniel Wall should be excluded

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

from the unit as a statutory supervisor, while the Union maintains that Wall is a nonsupervisory employee who should be included in the unit. I find that the Employer has failed to meet its burden of demonstrating that Wall is a supervisor within the meaning of the Act and I shall include him in the unit.

The Employer's Operations and Organizational Structure

The Employer operates 15 asphalt plants. Bob Andersson is the Employer's vice president and general manager for asphalt. Jeff Ciampa has held the position of operations manager since July 2007.⁴ He reports to Andersson and oversees 13 of the asphalt plants. Those 13 plants are all located in Massachusetts and are divided into two geographical territories, north and south. General Superintendent Dominic Mantica, who reports to Ciampa, oversees seven of the asphalt plants in the northern territory, including the Chelmsford plant at issue in this case. General Superintendent Alan Chabot oversees the asphalt plants in the southern territory.

The Chelmsford plant has two operations: a large drum asphalt manufacturing operation, and a small "RAP" crushing plant, where broken asphalt is prepared for recycling and reuse. The superintendent of the Chelmsford plant, John Landry, who reports to Mantica, is responsible for its operation and financial performance. Daniel Wall, who reports to Landry, has been the foreman on the night shift for about four years, and works as the drum plant operator on the night shift.

Eight other individuals in the petitioned-for unit work at the Chelmsford facility. Ciampa testified that Ross Cloutier is the drum plant operator on the day shift, that Ken Webster is a loader operator, and that Todd Gillis, Dan Murphy, Ryan Mahoney, and Sean Boucher are laborers. Brad Schuerman works primarily as the operator at the RAP plant and Dan Donovan works primarily as a loader operator at the RAP plant. Schuerman and Donovan work as laborers when the RAP plant is not in operation. Landry testified that the employees do not really have titles, that every person can do almost every job, and that crew members can be interchanged, although only Wall, Cloutier, and Mahoney can work as the plant operator.

The asphalt production season at the Chelmsford facility runs from about mid-April to about mid-December. During the production season, the plant operates 24 hours a day, generally five days a week, with a day shift from 3 a.m. to 3 p.m., and a night shift from 3 p.m. to 3 a.m. During the production season, Landry oversees operations on the day shift, and Wall oversees operations on the night shift. One to two other employees work with Wall on the night shift.⁵ During the off-season, the plant operates with only

⁴ Prior to that time, he was the safety manager.

⁵ Landry testified that there is a third person on the night shift 80 percent of the time and that last year everybody floated to the night shift. Wall testified that he works only with Dan Murphy 80 percent of the time and that sometimes a third employee floats to the night shift.

one shift, from 7 a.m. to 3 p.m., and the crew performs maintenance work on the plant to get ready for the upcoming production season.

Wall's Supervisory Status

Responsible direction:

The Chelmsford drum plant manufactures various types of asphalt for paving crews.⁶ Around 2 or 3 p.m. each day during the production season, an operations group in Littleton, Massachusetts faxes over to Chelmsford a production order that sets forth the amount and types of asphalt to be produced, based on customer need and an internal schedule.

During the production season, a plant operator operates a computer in the facility's control tower that runs the drum used in the manufacturing process. The drum mixes the variety of stone needed to produce each type of asphalt. The "recipe" for each type of product is formulated by the computer. The computer sends commands to various pieces of machinery, including bins, which dump the various types of stone into the drum. The plant operator monitors the computer to make sure that the correct type and amount of stone goes into the mix and that the product is made correctly. As noted above, Ross Cloutier works as the drum plant operator on the day shift, and plant foreman Daniel Wall works as the drum plant operator on the night shift.

It appears that the loader operators operate loaders that fill the bins with stone and also maintain the yard.⁷ The record does not reveal the precise duties of the laborers during the production season, except that they perform constant upkeep and maintenance on the plant. Most of the crew members are fairly experienced, having worked in Chelmsford for several years.

Wall testified that, when he arrives at work on the night shift, he looks at the production schedule and uses the computer to make the type of mix required by the schedule. He communicates by CB radio to the loader operator, who works outside, for example, that they are to make 1000 tons of dense graded base or dense binder. The loader operator then knows what to do.⁸ Wall communicates to the loader operator again when it is time to switch materials. The schedule may require the night shift to produce a variety of products on a given night. Landry testified that Wall decides what material to

⁶ The Chelmsford plant makes various types of asphalt, including base, which is made with a heavier stone, a coarse layer, finer products, finish coat, and many mixes in between.

⁷ Cloutier testified that "equipment operators" perform this function, but it appears that he was referring to the petitioned-for "loader operators."

⁸ Cloutier testified that he has worked with Wall on the night shift running the loader. Once Wall told him the volume and type of product they were going to make, he then knew what to do without any further direction.

put up for the following day and what is the best way to fill up the silo. Wall testified that sometimes Cloutier, the plant operator from the day shift, has already “put up” the mix for the entire night shift and Wall goes by that. Sometimes Wall decides the order of production for the night on his own and sometimes Landry helps him decide.

Landry is in charge of the crew during the winter off-season, when there is only one shift. Landry assigns the maintenance work to the crew through Wall, who conveys the assignments to them. Last season, several employees, including Wall, worked on the drums, while others worked on the silos.

On February 5, 2008, during the Employer’s off-season, Wall was disciplined as a result of an incident involving employee Kenneth Clough. Clough injured himself by using an unguarded grinder, but Clough and some other employees, including Wall, falsely reported that the injury was due to a slip and fall accident within the drum unit. Clough was terminated for the incident. In a disciplinary notice in which Operations Manager Ciampa notified Wall that he was being suspended for two-weeks, Ciampa wrote, “Numerous employees were found to have misled management inquiries into this incident. You actively participated in this deception, including providing deliberately misleading statements to managers regarding the circumstances of this event. As the plant foreman, it is your duty and obligation to ensure that management directives and corporate procedures are properly followed. I am greatly disappointed at your actions regarding this event, and find your behavior on this issue to be greatly inconsistent with the trust and responsibility placed in you in your position of plant foreman.”

Wall testified that it was generally assumed he was a plant foreman, although he was never told so in writing until February 2008. Before his suspension, Wall told Ciampa that he did not know his duties and that it would be nice to have something to go by. Upon Wall’s return, Ciampa outlined Wall’s duties in a February 15, 2008 memo. Referring to Wall as a foreman and supervisor, Ciampa wrote that, during the remainder of the plant maintenance season, Wall’s core objectives were to coordinate daily activities with the plant manager and to supervise the work activity of the crew. *Inter alia*, he was to assist in the morning briefing of the crew; physically monitor work projects to ensure that all crew members are working safely, focused on assigned work projects, and working efficiently; meet daily with the plant superintendent to review the progress of projects; and prepare a weekly progress report regarding the completion of scheduled maintenance work. Ciampa wrote that Wall’s progress in meeting these objectives was to be reviewed with Mantica or Ciampa on a weekly basis thereafter. In a March 25, 2008 performance assessment one month later, Mantica wrote to Wall, *inter alia*, that his supervision of the crew through the work day had improved significantly.

Assignment:

Ciampa testified that Landry and Wall determine shift assignments and that there is a floating position at night. Wall testified that he sometimes has input into which employees work on the night shift; he asks for somebody and sometimes he gets them

and sometimes not.⁹ If Wall will be absent for the night shift, he asks Ross Cloutier or Ryan Mahoney to fill in for him. Landry finds someone to cover for Wall, if Wall cannot find a replacement for himself.

The plant is not normally manned on weekends, but sometimes there is a demand for weekend overtime work. Ciampa testified that Wall manages the schedule for weekend assignments and tells Landry who will be working. Landry testified that he and Wall handle weekend overtime “fifty-fifty.” As noted above, only three people, Wall, Cloutier, and Mahoney, can work as plant operator. Apart from that position, it does not matter who works overtime, as long as there is coverage. Wall tells Landry who will work overtime, and if Landry feels it is not the right person, he will say something. Wall testified that he finds out from Landry a lot of times if overtime is needed. Wall denied that he has decided independently whom to assign to work a weekend or holiday. Wall and Cloutier both testified that the decision as to who will work weekend and holiday overtime is made collectively and that the group agrees 95 percent of the time. Landry is sometimes present during these discussions and sometimes not. Wall testified that the decision has often been made before he arrives. Sometimes Wall tells Landry who will cover, but others may tell Landry, as well. Cloutier testified that Wall has never told him he has to work overtime. Cloutier testified that Wall has told the person he works with on the night shift that he has to work overtime, but that this information came from Landry.

Landry testified that when he is not present, for example, when he leaves work early or is on vacation, Wall is in charge and that employees who want to leave work early are supposed to ask Wall if they can leave, and that Wall decides. Wall testified that Landry has told him that if there is less than twelve hours of work, he can send employees home early if he wants. Wall testified, on the one hand, that Landry tells him this before the season starts and, on the other hand, that Landry tells him this most likely before the shift starts. In either event, Wall testified that he, Wall, makes the determination on any given night. Cloutier, who works on the day shift during the production season, testified that, if he has finished his work, Landry gives him the option to go home or to find other things to do around the plant and that Wall gave him the same option during the one week he worked at night.

Ciampa testified that he has authorized Landry and Wall to grant time off and that they both have done so. Ciampa testified that Wall manages the schedule for both shifts, not just his own shift, and that employees make time off requests to Wall, who makes a recommendation to Landry. Landry testified with respect to vacation matters that he does not care who does the production, as long as someone is covering.

Employees punch a timecard. Wall does not have his own password for the timekeeping/payroll system, but, previously, Landry gave Wall his password to the timekeeping system and Wall was handling the approval of time records. At some point,

⁹ Wall did not specify who he asks, although it would appear that he would ask Landry.

Landry's boss asked him to stop this practice, so Wall no longer has access to the timekeeping system.

Discipline:

Ciampa testified that he has authorized Landry and Wall to issue discipline, and Landry testified that Wall is authorized to issue and recommend discipline. Wall testified that Landry has told him that anybody can write anybody else up, although he does not know if other employees have done so.

Several employees at the Chelmsford plant have been terminated in the last few years, but Wall played no role in their terminations.¹⁰ Wall did play a role in issuing three written warnings to employees in 2007, which were submitted into evidence. One day in March 2007, Landry instructed employees Russell Finnie and Bradley Schuerman to get equipment ready for a pick, but they failed to do so. Wall testified that, the next day, Landry told Wall to write both employees up for failing to get the equipment ready and that they would get a day without pay if they did it again.¹¹ Wall prepared written warnings for both employees on March 12, 2007, accordingly. He and Landry both signed the warnings, and Wall presented them to the employees. Landry testified that he does not remember how these warnings came to be written.

Both Landry and Wall signed another written warning issued to Finnie on April 11, 2007, for damaging equipment. Both Landry and Wall testified that when Landry arrived one morning, Landry noticed damage to a loader that had occurred the night before. Landry instructed Wall to write up Finnie. Wall testified that he asked Landry what to write for a consequence, and Landry replied that they would give Finnie a day off

¹⁰ Landry testified that he, himself, does not have the right to fire employees.

¹¹ Ciampa testified that the employees who were the subject of the three warnings at issue were each suspended for a day as a result of Wall's recommendation. I note that the warning form includes boxes to be checked off for "Action to be taken," including boxes for warning, probation, suspension, dismissal, or other. In each of the three warnings at issue, the box for "warning" was checked off rather than the box for "suspension." The form also includes a space in which to enter "Consequences should incident occur again," and Wall wrote in that space for each of the three warnings that the consequence would be a day off without pay. Thus, it appears that Ciampa was mistaken in his testimony that the employees were actually suspended and that the employees were merely issued a written warning and put on notice that they faced the prospect of a one-day suspension in the event of a recurrence.

without pay if it occurs again. Wall filled out the form accordingly, both men signed it,¹² and it appears that Wall presented it to Finnie.¹³

Wall testified that the only other time he could remember writing someone up was an instance in which he wrote up employee Dan Murphy for being late. Wall did not know if he asked Landry about that warning, which was not submitted into evidence.

Finally, among the exhibits the Employer submitted in response to a subpoena,¹⁴ after the last day of the hearing, but before the record closed, are two 2004 “verbal” written warnings issued to Wall, which the Employer asserts in its post-hearing brief that Wall issued to himself. The first warning is a March 8, 2004 warning for a safety violation (Joint Exhibit 4). Notwithstanding the Employer’s contention that Wall issued this warning to himself, it appears that Landry issued it, because Wall signed the warning, which deals with Wall’s unsafe conduct, only in the space for “employee,” while Landry signed the warning as “manager.” On the other hand, notwithstanding the Union’s assertion to the contrary,¹⁵ it does appear that Wall issued a March 22, 2004 “verbal” warning for substandard work¹⁶ (Joint Exhibit 3) to himself, as Wall signed the warning in the space for “safety manager,”¹⁷ no one else signed the warning, and Wall wrote in the narrative, “I, being Danny,....” in describing his own conduct in regard to putting out a fire.

¹² In the space on the warning portion of the form titled By Whom, presumably indicating by whom the warning is being issued, it states “John Landry/Don Wall.” On the line on the form for the “Signature of Supervisor Who Issued Warning,” Landry’s signature is first and Wall’s is second. The warning states, in pertinent part, “On 4/29/2007 while running the rap yard loader Russ ripped off the back step of the loader. Russ failed to report it to me.” The warning does not indicate who is being referred to by the word “me.”

¹³ Wall testified that it was his understanding that Landry asked him to do this rather than do it himself, because Finnie is confrontational, and Landry is a nice guy who does not like confrontation. Finnie became belligerent, and Wall told him to deal with Landry. Finnie was later fired after a confrontation with Landry, but Wall was not involved in the matter.

¹⁴ The Employer submitted, *inter alia*, all discipline and discharge records for the period April 7, 2007 through April 7, 2008, which included no discipline issued by Wall other than the three warnings already described above.

¹⁵ The Union contends that whoever wrote the warning wrote across the line for the employee’s signature and that Wall signed it on the first available line, which was the line for the safety manager.

¹⁶ The warning was for failure to completely prevent a fire from starting.

¹⁷ It should be noted that Wall’s narrative concerning his conduct covers the signature lines on the form for employee and for manager, so that safety manager is the first signature line available for use on the form.

Evaluations and raises:

Employees at the Chelmsford plant receive verbal evaluations from Landry, but do not receive written evaluations. Landry makes recommendations for raises to Mantica. Landry testified that, because he is not present on the night shift, he and Wall discuss employee performance, that Wall sometimes reports back negative performance issues, and that he asks Wall for his opinion about employee raises, presumably about night shift employees. Wall testified that he has never been asked for input into an employee's performance review and that he has talked with Landry about what went well or poorly on a shift, but that he did not understand that this information was being used in performance reviews.

Acting supervisor:

As noted above, Wall fills in for Landry when he leaves early or is on vacation or otherwise temporarily absent.¹⁸

Management meetings:

During the production season, Landry and Wall have daily production "meetings" over the phone about who will produce what product and when. Ciampa meets with Landry, and sometimes Mantica, at the Chelmsford plant every week or two and Wall sometimes attends, depending on the meeting. Topics at these meetings include plant operations, financial performance, environmental compliance, permitting issues, and safety issues. Last fall, they discussed how they would track the estimated time and personnel required to perform various maintenance projects over the winter. Ciampa assigned Wall to meet with Landry daily, to track the performance of the work, and to report that information to Gary Pothier, who works for Ciampa. Thereafter, Wall sent a few weekly e-mails to Pothier in which he estimated the hours the men had worked on various projects.

Other secondary indicia:

As noted above, during the production season, Wall works as the plant operator on the night shift and, thus, regularly performs unit work. Cloutier testified that Landry does not regularly do unit work, although he fills in for Cloutier as the plant operator in

¹⁸ Landry was once transferred to a different site for a short period of time and was suspended for two weeks in the spring of 2007 due to a significant environmental compliance issue. Ciampa testified that Wall was responsible for the plant during Landry's suspension, but Wall testified that he was working nights at the time and did not fill in for Landry during his suspension. Plant operator Ross Cloutier testified that another plant superintendent covered for a week during Landry's suspension, that Mantica sometimes fills in for Landry, and sometimes no one fills in. Landry testified that, when Wall covers for him during the production season, Wall does not work around the clock, but coordinates with the employees on the day shift.

an emergency. Landry testified that during the summer he operates the computer for several hours at a time.

Wall and the other petitioned-for employees are hourly paid and eligible for overtime pay. The hourly rate of the petitioned-for employees ranges from just over \$20 to just under \$25 per hour. Wall is the highest paid among them at \$25.70 per hour, and he is paid more than some employees who have been there longer than he has. Landry is salaried and not eligible for overtime pay. There is a substantial difference between Wall's pay and Landry's pay.

Wall and the plant operators work in the operations room. Landry has a desk in a very small office. Landry and Wall are the only individuals in Chelmsford who have e-mail accounts. Landry and Mantica carry company cell phones and company credit cards, and Landry receives a car allowance. Wall has not been issued a company cell phone and does not receive a car allowance. The record does not reveal whether Wall has use of a company credit card. Hourly and salaried employees at the Employer's non-union facilities receive the same health and pension benefits.

Wall and the unit employees wear the same blue uniforms. Ciampa testified that Landry wears a similar uniform, but Wall testified that Landry wears white shirts because he spends more time in the office and does not do much around the plant anymore. The unit employees wear yellow hard hats, while Landry and Wall wear white hard hats. Ciampa testified that white hard hats are used to designate supervisory personnel. Wall testified that his hard hat was given to him by an electrician who worked at the facility rather than issued by the company, that Landry wore a yellow hard hat previously, and that the color of the hard hat means nothing to him.

Landry testified that he and Wall are the only two individuals who have authority to hire outside vendors, that Wall does not need prior approval to do so, and that one time when Landry was out for almost a week, Wall hired a vendor to do some work on the facility's septic system. According to Wall, he called Mantica to tell him that the septic system was full. Mantica told Wall to call somebody to get it pumped out, and said that Landry would deal with the paperwork upon his return.

The Chelmsford employees are supposed to attend a safety meeting every Monday. Wall is responsible for holding the meetings on the night shift, and Ross Cloutier sometimes runs them for the day shift. This involves selecting a movie from several that are available and playing it for the employees.

ANALYSIS

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use

of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*¹⁹ The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*²⁰ The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care.*²¹ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*²²

In *Oakwood Healthcare, Inc.*,²³ the Board refined its analysis of the terms “assign,” “responsibly direct,” and “independent judgment” in assessing supervisory status. The Board announced that it construes the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.”²⁴

With respect to “responsible direction,” the Board explained in *Oakwood* that, if a person has “men under him” and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both “responsible” and carried out with independent judgment. For direction to be “responsible,” the person directing the oversight of the employee must be accountable for the performance of the task by the other. To establish accountability, it must be shown that the employer delegated to the putative supervisors authority to direct the work and take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisors if they do not take these steps.²⁵

Finally, the Board held in *Oakwood* that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing

¹⁹ 273 NLRB 1677, 1689 (1985).

²⁰ 175 NLRB 871 (1969).

²¹ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

²² 308 NLRB 101, 102 (1992).

²³ 348 NLRB No. 37 (September 29, 2006).

²⁴ *Id.*, slip op. at 4.

²⁵ *Supra*, slip op. at 5-7.

data.”²⁶ “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.”²⁷ The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.”²⁸

I conclude, for the reasons set forth below, that the Employer has failed to meet its burden of proving that the night shift foreman is a Section 2(11) supervisor.

Responsible direction:

The evidence does not support a finding that Wall is a statutory supervisor by virtue of his authority to responsibly direct employees, as asserted by the Employer. I find, at the outset, that Wall does direct other employees on the night shift, in that Wall decides, at least sometimes, the order in which the various products will be produced on a given night, and he communicates to the loader operator which product is next.²⁹ The record is insufficient, however, to demonstrate that the degree of judgment Wall exercises in determining the order of production or in directing the loader operator to switch to another product rises above the routine or clerical. There is no evidence regarding the factors Wall considers in selecting the order of production. The crews are fairly experienced, so that once Wall communicates that it is time to switch to another product, the loader operator knows what to do without any further direction. *Croft Metals, Inc.*³⁰ (lead persons do not exercise independent judgment in directing employees, where the employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance, and the employer adduced almost no evidence regarding factors weighed or balanced by the lead person in making production decisions and directing employees).

Furthermore, there is no evidence that Wall’s direction of the loader operator is “responsible,” as required by *Oakwood*, in that he faces the prospect of either positive or adverse consequences based on the performance of the employees he directs. The Employer argues that Wall’s February 2008 suspension for the incident involving Clough shows that a failure on the part of Wall to effectively supervise his crew has resulted in his discipline. The disciplinary letter issued to Wall, however, makes clear that Wall was suspended for his own misconduct in providing deliberately misleading statements to

²⁶ Id., slip op. at 8.

²⁷ Id.

²⁸ Id.

²⁹ I note that there is no evidence regarding the type of directions Wall gives, if any, to the third employee on the night shift, when there is one on duty.

³⁰ 348 NLRB No. 38, slip op. at 6 (September 29, 2006).

managers rather than for the misconduct of his crew. The fact that Wall's progress in meeting certain objectives, including supervising the work activity of the crew, has or will be periodically reviewed, does not demonstrate the requisite accountability, where there is no evidence that any action, either positive or negative, has been or might be taken as a result of the reviews. *Golden Crest Healthcare Center*.³¹

Assignment:

The Employer asserts that Wall is a statutory supervisor because he has effective input regarding which employees are assigned to the night shift, assigns overtime work, grants time off, and authorizes employees to leave the plant. I find that the Employer has failed to demonstrate that Wall's role in these matters constitutes "assignment to a time" within the meaning of *Oakwood*.³²

The fact that Wall sometimes has input into which employee will work on the night shift does not demonstrate his supervisory status. Wall's testimony that sometimes he gets the employee he asks for and sometimes not falls short of demonstrating that his recommendations in this area are effective. Further, the record is devoid of testimony concerning the factors, if any, that Wall takes into account in recommending that certain employees work the night shift. I note that only two employees, Cloutier and Mahoney, are qualified to fill in for Wall as plant operator on the night shift, and Landry testified that all of the other employees are interchangeable. In these circumstances, the Employer has failed to demonstrate that Wall exercises independent judgment in recommending that particular employees work the night shift.

Wall's role with respect to the assignment of weekend overtime work does not demonstrate his supervisory status. It appears that, the vast majority of the time, the employees collectively decide who will work overtime, and Wall or another employee merely relay a group decision to Landry. To the degree that Wall does assign or recommend the assignment of overtime himself, which he denies, there is no evidence that he exercises independent judgment in doing so, in the absence of evidence, as set forth above, of the factors he considers in assigning or recommending one employee over another for overtime work. Finally, it is well established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken rather than authority merely to *request* it. *Golden Crest Healthcare Center*.³³ Here, there is no evidence that Wall has been empowered to require employees to work overtime.

³¹ 348 NLRB No. 39, slip op. at 5 (September 29, 2006).

³² The Employer does not contend that Wall assigns employees to a place or to their overall duties, nor is there any evidence to support such a contention.

³³ *Supra*, slip op at 3.

Similarly, Wall's role in recommending the approval of time off requests and permitting employees to leave early if there is fewer than twelve hours of work does not establish his supervisory status, in the absence of any evidence of the types of judgments he makes in recommending approval or disapproval of time off requests or in sending employees home early.

Discipline:

The Employer has failed to establish that Wall has authority either to issue discipline independently or to effectively recommend discipline. Notwithstanding Ciampa's and Landry's general testimony that Wall is authorized to issue discipline and to recommend it, there is no evidence as to how or when they actually empowered Wall to do so. To the contrary, the February 15, 2008 memo in which Ciampa set forth Wall's "supervisory" responsibilities made no mention of Wall's authority in disciplinary matters.

Further, the only documented examples of Wall's actual involvement in the disciplinary process suggest otherwise. In the case of the three warnings to other employees that were submitted into evidence, Wall clearly did not issue the warnings independently, because he issued them only after being instructed to do so by Landry. *Ryder Truck Rental*³⁴ (warning that employee would be suspended for three days without pay if misconduct recurred did not demonstrate supervisory status, where, according to the uncontested testimony of the individual who issued it, a supervisor directed him to write that particular warning). Further, it was Landry who dictated the level of discipline in each case, so that it cannot be said that Wall effectively recommended discipline or even that he recommended it at all. This is not even a case where the individual whose supervisory status is in dispute initiated the disciplinary process by reporting employee misconduct to a superior. Here, Landry, himself, observed the misconduct in each case and then directed Wall to prepare warnings for his and Wall's signature. This falls far short of authority to discipline or effectively recommend discipline.

*Berthold Nursing Care Center, Inc.*³⁵ cited by the Employer, does not require a different result, as the LPNs found to be statutory supervisors in that case, unlike Wall, filled out employee counseling forms on their own initiative and also made recommendations for discipline, such as suspension, which were followed without independent investigation. *Metro Transportation Services, Inc.*,³⁶ cited by the Employer, is distinguishable in that the Board found that the maintenance manager at issue in that case was clearly told by his superior that he was empowered to impose differing levels of discipline, and there was no suggestion that he needed to consult with anyone else before acting.

³⁴ 326 NLRB 1386, 1387 (1998).

³⁵ 351 NLRB No. 9 (2007).

³⁶ 351 NLRB No. 43, slip op. at 4-5 (2007).

Wall's testimony that he once wrote up employee Dan Murphy for being late is insufficient to demonstrate his supervisory status, where there was no further testimony about the circumstances under which he issued that warning, and the warning itself was not submitted into evidence. Further, because it is the only other warning Wall could remember writing in his four plus years as night shift foreman, it was, at most, an isolated and sporadic exercise of supervisory authority.

Contrary to the Employer's assertion in its post-hearing brief, the fact that Wall may have once memorialized a verbal warning that he issued to himself does not demonstrate his supervisory status. While this warning may be evidence of Wall's admirable conscientiousness concerning his own conduct, it does not establish his supervisory status, as statutory supervisors must exercise supervisory authority over others.

Evaluations and raises:

In the section of its post-hearing brief devoted to issuance of discipline, the Employer asserts that Wall provides Landry with his opinion regarding disciplinary issues and the overall performance of employees, and that Landry uses this information to recommend pay raises. This falls far short of demonstrating that Wall possesses authority to effectively recommend raises, where there is no evidence of any particular instances in which Wall recommended that an employee receive a raise of a certain amount, no evidence that any such recommendations were actually followed, and no evidence that such recommendations were followed without independent investigation.

Acting supervisor:

The fact that Wall fills in for Landry when he leaves early or is on vacation or otherwise temporarily absent does not confer supervisory status on Wall. It is well established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. The Board has held that assumption of supervisory duties during vacation periods or other unscheduled occasions is irregular and sporadic and, therefore, insufficient to establish supervisory authority. *Quality Chemical, Inc.*;³⁷ *Hexacomb Corp.*³⁸

³⁷ 324 NLRB 328, 331 (1997).

³⁸ 313 NLRB 983, 984 (1994).

Secondary indicia:

Secondary indicia are insufficient by themselves to establish supervisory status when there is no evidence presented that an individual possesses any one of the several primary Section 2(11) indicia. *Ken-Crest Services*.³⁹ Thus, in light of my finding that Wall possesses none of the primary indicia, the fact that he attends management meetings, receives higher pay than the other petitioned-for employees, and, unlike the unit employees, has an e-mail account, does not transform him into a statutory supervisor.⁴⁰

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time plant operators, loader operators, laborers, and foremen employed by the Employer at its Chelmsford, Massachusetts facility, but excluding all other employees, clerical employees, office employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated

³⁹ 335 NLRB 777, 779 (2001).

⁴⁰ Assuming that Wall has independent authority to hire outside vendors, which was not proven by the one instance in which Wall obtained prior approval before hiring a septic company, that would show managerial rather than supervisory status, if anything. I note that the Employer does not seek to exclude Wall as a managerial employee and that, in any event, there is no record evidence that Wall has ever actually hired a vendor independently. Cf. *Concepts and Designs, Inc.*, 318 NLRB 948, ALJD at 956-957 (1995).

before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by International Union of Operating Engineers Local Union No. 4, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*,⁴¹ *NLRB v. Wyman-Gordon Co.*⁴² Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon Health Care Facility*.⁴³ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before May 14, 2008. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 21, 2008.

In the Regional Office's original correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select

⁴¹ 156 NLRB 1236 (1966).

⁴² 394 U.S. 759 (1969).

⁴³ 315 NLRB 359 (1994).

the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 7th day of May 2008.